Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1486

ROBERT FRANKLIN BROWN,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported in the 140 Ga. App. 160 (1976). The denial of a motion for rehearing by the Court of Appeals of Georgia, the denial of the writ of certiorari by the Supreme Court of Georgia and the denial of a motion for reconsideration by the Supreme Court of Georgia are not reported. The opinion of the Court of Appeals of Georgia is attached on Page A-3 of the Appendix.

JURISDICTION

On October 8, 1976, the Court of Appeals of Georgia rendered and entered a judgment affirming the Petitioner's conviction and sentence of 15 years to serve for the

offense of voluntary manslaughter, which judgment of conviction had been entered on October 9, 1975, as the result of a jury verdict of September 24, 1975. On October 25, 1976, the Court of Appeals of Georgia denied a motion for rehearing. On January 7, 1977, the Supreme Court of Georgia denied a petition for the writ of certiorari. On January 27, 1977, the Supreme Court of Georgia denied a motion for reconsideration of the petition for the writ of certiorari. The jurisdiction of this court is invoked under 28 USC Sec. 1257 (3) and U.S. Supreme Court Rule 19 (a), 28 U.S.C.A.

QUESTIONS PRESENTED

The questions presented are as follows:

1) Whether it violated the 6th Amendment right of Petitioner to an impartial jury and his 5th Amendment right to due process of law for the trial judge to excuse for cause three otherwise fully qualified jurors for the sole reason that they were conscientiously opposed to capital punishment in a case where capital punishment was not a possible option under the law.

2) Whether the trial court violated Petitioner's 5th Amendment right not to incriminate himself and his 6th Amendment right to counsel by allowing into evidence oral testimony of the investigating sheriff regarding an oral statement allegedly made by the Petitioner on Monday, after he had been in custody from the time of the homicide on the previous Saturday, where the evidence of record shows by the unrebutted and unimpeached testimony of the Petitioner that he did not understand all of his 5th and 6th Amendment "Miranda" rights and did not affirmatively and intelligently waive such rights, and that the alleged statement which was critical to the State's case was testified to have been heard by

the sheriff after repeated requests by the Petitioner for the assistance of counsel in his defense.

3) Whether the trial court violated the Petitioner's 5th Amendment right to due process of law and his 6th Amendment right to the assistance of counsel by denying Petitioner's motion for a one week continuance where the motion was made on an arraignment under a murder charge on Friday before the beginning of a three week term of criminal trials, and the record shows that trial counsel had been retained on Wednesday, had met Petitioner initially on Thursday, had discussed the case initially with the District Attorney the same day, and the case was scheduled for trial on the following Monday.

4) Whether the trial court violated Petitioner's 5th Amendment right to due process of law by refusing, over objection and request of Petitioner's counsel, to give the sole defense theory, of accident, in a recharge to the jury where such defense theory had been charged in the original charge and on recharge the court charged murder, justifiable homicide in self-defense, voluntary manslaughter, involuntary manslaughter, pointing a pistol at another and reasonable doubt.

CONSTITUTIONAL PROVISIONS INVOLVED

5th Amendment of The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

6th Amendment of The United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Petitioner, an employee of Lockheed-Georgia Corp. for 23 years (T-191), lived in a mobile home on the outskirts of Douglasville, Georgia, (T-80) with his wife, (T-80), the deceased, their twin babies and children of the deceased by a former marriage. (T-141). On Saturday evening, March 29, 1975, Sheriff Earl Lee of Douglas County received a call from Petitioner who, according to Lee, said that he wanted the Sheriff to come to Petitioner's residence because the deceased had shot herself. Petitioner said he had called an ambulance. (T-83). The deceased was lying in the yard with a pistol in her hand. (T-88). The deceased was dead from two bullets, one of which had entered the upper left chest below the shoulder (T-218) and had exited through the upper right back (T-219). The other had entered the left side of the midline (T-218) and had exited through the right side (T-219). Sheriff Lee arrested Petitioner but didn't charge him at that time (T-99, 100). The Sheriff did not advise Petitioner of any constitutional rights at the scene, but interviewed Petitioner at the jail (T-101). The Sheriff testified that at the jail he advised Petitioner of his "Miranda" rights. (T-101) Petitioner testified that when interviewed he was sick, in pain, had been vomiting, was in a weakened condition, and had been unconscious (T-121-123). Petitioner testified that he did not understand that his right to have a lawyer encompassed the right to have him immediately present at the time when Petitioner was being interviewed (T-124, 125, 126). Petitioner further testified that he did not understand that he had the right not to answer a law enforcement officer's questions (T-124, 125, 126). Petitioner began to ask for a lawyer either on Saturday evening (T-101) or Sunday, the Sheriff was confused as to which (T-107). A tape recording was made of this jail interview (T-139, 140). In it, Petitioner said that the deceased had a pistol in hand and had threatened suicide as they were in the yard together (T-141). Petitioner said that he tried to take the pistol away from the deceased and in the struggle the pistol fired twice and hit her. (T-142, 143). Petitioner said he tried to help the deceased and then he called the ambulance (T-144). After Petitioner told Sheriff Lee that he wanted a lawyer and the Sheriff tried to help Petitioner locate one (T-111, 112), Petitioner was persuaded by a Deputy Sheriff to take a polygraph test on Monday, March 31, 1975, allegedly to "help" Petitioner in spite of Petitioner's renewed request for a lawyer (T-126, 127). After the polygraph test Petitioner was brought to Sheriff Lee at the Courthouse (T-113, 126). The Sheriff testified that he interviewed Petitioner at this time and testified to his recollection of what Petitioner allegedly said, though the Sheriff admitted to mental confusion about it (T-155). The alleged oral statement was not reduced to writing (T-104, 115). It was not tape-recorded. (T-104, 105, 115). Sheriff Lee

was busy in court for two to four hours before he went to his office and reduced his recollections to report form (T-150) from which he testified. The Sheriff admitted that he kept no contemporaneous notes (T-150, 151). Lee admitted that in the case of his recollection recorded in his report of the interview there was a completely erroneous statement about Petitioner throwing a rock at deceased when she allegedly ran from him (T-154-163), which statement Lee had gotten from a child of the deceased, David Wayne Brown, who was incompetent to testify (T-262). Lee testified from the same portion of the same report that Petitioner allegedly said that he fired two shots at deceased when she had run about 6 to 8 feet from him (T-164). On the contrary, Kelly Fite, State Crime Laboratory Microanalyst, testified that in his opinion the pistol could have been as much as 18 inches from the entrance wound in the left hip of deceased and his firm opinion was that the muzzle distance from the chest wound was about 12 inches (T-235, 236). He testified that for the shot to have been from 6 to 8 feet away was "impossible." (T-237). Sheriff Lee testified that after Petitioner had been trying to obtain an attorney that Petitioner made an additional statement on about Tuesday or Wednesday (T-169, 170, 171). Lee testified that he declined to ask Petitioner any questions at this time because of Petitioner's desire for a lawyer but that Petitioner insisted that Lee listen to him (T-173-6).

The Petitioner was indicted by the Douglas County, Georgia, Grand Jury on August 26, 1975 for the alleged murder of his wife, Shirley Ann Brown, on March 29, 1975. Petitioner was arraigned on Friday, September 19, 1975, and his trial was scheduled for the following Monday, September 22, 1975. The following week was the beginning of a three-week term of criminal cases. The

Petitioner's counsel's motion for a one-week continuance was overruled by the court in spite of the showing that trial counsel had been retained on Wednesday, September 17, 1975, first met the client on Thursday, September 18, 1975, appeared at arraignment on Friday, September 19, 1975 and requested only a week to prepare to defend the case. The court based its denial of the motion for continuance on the fact that there had been a counsel listed of record for the Petitioner for approximately three months. The record reflected no service rendered by that attorney in behalf of Petitioner. The above proceedings on arraignment are reflected in the supplemental transcript contained in the record. On the trial of the case on Monday, September 22, 1975, the court, on motion of the district attorney, dismissed three otherwise fully qualified jurors for the sole reason that they were conscientiously opposed to capital punishment. This was done over objection of Petitioner's counsel. On the same basis, Petitioner's counsel filed a written challenge to the array and a motion for a mistrial, both of which were overruled by the trial court. (T. 29, 31, 32, 33, 57, 58, 74, 75).

During the course of the trial and in a *Jackson v. Denno* hearing evidence was adduced of some recitation by Sheriff Lee of the "Miranda" rights to the Petitioner but evidence was adduced in considerable detail that the Petitioner did not understand that he had a right to have an attorney present with him before questions were asked and that he did not understand that he could decline to answer when a law enforcement officer questioned him (T. 124-126). The evidence further showed that the Petitioner continued to request a lawyer from either the Saturday night of his arrest (T. 101), or the following Sunday morning and on through the period of alleged statements taken on Saturday night, the following Mon-

day and later in the week (T-107, 126, 127). The testimony of the Petitioner that he did not understand his "Miranda" rights and did not intelligently waive them was not challenged by the District Attorney either in cross examination or by way of rebuttal evidence (T-90-178).

After the jury had retired to deliberate, it returned and requested a recharge (T-319). The court then recharged on murder, justifiable homicide in self-defense, voluntary manslaughter, involuntary manslaughter, pointing a pistol at another and reasonable doubt. (T-319-321). Petitioner's counsel objected to the recharge on the basis, among other things, that the court failed to recharge the defense theory of accident though it had been in the original charge. (T-322). Over Petitioner's counsel's objection the court refused to recharge the jury on the theory of accident (T-322).

The federal questions sought herein to be reviewed were raised in the trial and appellate courts below in the following manner:

1) The question of the excuse of three fully qualified jurors in this case, where capital punishment was in truth not a possible option, for the sole reason that they were conscientiously opposed to capital punishment, was raised by objection of Petitioner's counsel when the District Attorney moved to excuse the jurors for this cause on voir dire, by written challenge to the array and by motion for mistrial, all of which objections and motions were overruled by the trial court. (T-29, 31, 32, 33, 57, 58, 74, 75).

The question was raised on motion for a new trial, under Grounds "5", "6" and "7", which were denied by

the trial court. The question was raised by Enumerations of Error numbers "5", "6" and "7", on appeal to the Court of Appeals of Georgia, which court affirmed the trial court in "Division 3" of its Opinion.

The question was raised by Ground "3" of Petitioner's motion to the Court of Appeals of Georgia for rehearing, which was denied. The question was raised by Question "(A)" in Petitioner's Application to the Georgia Supreme Court for the writ of certiorari, which was denied. Motion for reconsideration was also denied.

2) The question of the denial of Petitioner's 5th Amendment right against self-incrimination and his 6th Amendment right to assistance of counsel was raised by Petitioner's counsel after a *Jackson v. Denno* hearing by motion to suppress alleged statements (T-119, 128). The trial court overruled the motion (T-128). The first testimony of alleged statements was admitted into evidence before the jury (T-130) over Petitioner's objection (T-131). Petitioner maintained, with the permission of the court, a continuing objection which incorporated all prior objections to any alleged statements (T-134). The alleged "Monday Statement" which is the alleged statement critical to the State's case, was admitted into evidence over Petitioner's continuing objection. (T-148).

This question was raised on motion for new trial by ground "13", which motion was denied by the trial court. This question was raised by Enumeration of Error "13" in Petitioner's appeal to the Court of Appeals of Georgia, which court affirmed the trial court in "Division 6" of its Opinion. The question was raised in motion for rehearing before the same court, under Ground "4", which motion was denied. The question was raised by Question "(B)" in Petitioner's application to the Georgia Supreme

Court for the writ of certiorari, which was denied. Motion for reconsideration was also denied.

3) The question of the denial of Petitioner's 5th Amendment right to due process of law and his 6th Amendment right to the assistance of counsel by the trial court's denial of a one-week continuance was first raised by the following motion which was filed at arraignment:

"Now comes the defendant in the above styled case and through his counsel shows the court as follows:

1.

Counsel was retained to represent the defendant in this case on Wednesday, September 17, 1975.

2.

That counsel met the defendant for the first time personally on Thursday, September 18, 1975 at which time he conducted his initial interview of the defendant.

3.

On Thursday, September 18, 1975 counsel discussed the case briefly with the District Attorney for the first time and received a copy of the indictment and list of witnesses.

4.

In the aforementioned conference counsel was advised that the defendant would be arraigned on Friday, September 19, 1975 at which time motions, if any, would be due to be filed.

5.

The District Attorney in the above mentioned conference further advised counsel that the above captioned case is the first case scheduled for trial on the following

Monday, September 22, 1975 and that the State is seeking a life sentence in this case.

6.

Counsel shows to the court that before even being retained in this case he was already scheduled to appear in court in DeKalb County, Georgia in a felony case on Tuesday, September 23, 1975.

7.

The District Attorney advises counsel that the current term of the criminal division of the court will run three weeks beginning on next Monday.

8.

Counsel states in his place to the court that this motion is not made for the purposes of undue delay.

9.

Defendant through his counsel shows to the court that it is imperative that counsel have an opportunity to investigate this case and properly prepare it for trial.

10.

The defendant through his counsel shows the court that for him to be forced on trial under such circumstances as aforementioned would be denial of due process of law to the defendant as guaranteed to him under the Fifth Amendment of the United States Constitution made applicable to the States through the 14th Amendment of the United States Constitution and Article One Section One Paragraph Three of the Georgia Constitution (Ga. Code Sec. 2-103).

11.

The defendant through his counsel shows to the court that to be forced on trial under such circumstances as aforesaid would deny him his rights under the Sixth Amendment of the United States Constitu-

tion as made applicable to the States through the 14th Amendment of The United States Constitution and under Article One Section One Paragraph Five of the Georgia Constitution in that he would be denied effective assistance of counsel.

WHEREFORE, the defendant through his counsel moves the court for a continuance of Two Weeks for the trial of the above captioned case in order that counsel might have adequate opportunity for preparation and yet the case still be continued at the time within the present term of this court."

In open court counsel amended his motion to request just a one week continuance (Supplemental Transcript-8). This motion was overruled by the trial court. (ST-10). Petitioner's counsel explicitly perfected the record on arraignment (ST-11), and on the commencement of trial (T-3) as corrected by order of the trial court on Febuary 3, 1976. This question was raised under Ground "4" of the Motion for New Trial, which was denied. The question was raised in Enumeration of Error "4" in Petitioner's appeal to the Court of Appeals of Georgia, which court affirmed the lower court in "Division 2" of its Opinion. The question was raised under Ground "2" in motion for rehearing, which was denied by the same court. The question was raised as Question "(C)" in Petitioner's application to the Supreme Court of Georgia for the writ of certiorari, which was denied. Motion for reconsideration was also denied.

4) The question of the trial court's denial of Petitioner's 5th Amendment right to due process of law by refusing, over objection and request of Petitioner's counsel, to include in a recharge to the jury the sole defense theory of accident was raised in the following manner: In the Court's original charge, the doctrine of accident was

charged (T-314). After deliberating the jury requested a recharge (T-319). The court gave a recharge and did not include therein the sole defense theory of accident (T-319-321). Petitioner's counsel excepted to the court's failure to include the theory of accident in the recharge and emphasized that it was part and parcel of the contact of the questions which the jury addressed to the court. (T-322). The court declined to correct its recharge (T-322). This question was raised under Ground "27" of the motion for new trial, which was denied. The question was raised in Enumeration of Error "23" in Petitioner's appeal to the Court of Appeals of Georgia, which court affirmed the trial court in "Division 8" of its Opinion. The question was raised under Ground "5" of Petitioner's motion for rehearing, which was denied by the same court. The question was raised by Question "(D)" in Petitioner's application to the Supreme Court of Georgia for the writ of certiorari, which was denied. Motion for reconsideration also was denied.

REASONS FOR ALLOWANCE OF THE WRIT

1) Exclusion of Jurors

This Honorable Court should grant the Writ of Certiorari for the special and important reason that in this case the lower courts have sanctioned an arbitrary and capricious exclusion of fully qualified jurors as if the decisions of This Court in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 44 U.S. Law Week, 5230(3); 49 L.Ed.2d (2) 859 (1976), had never been rendered, and as if *Georgia Code Section* 27-2534.1 had not been enacted after *Furman* and had not been construed by *Gregg*.

The ruling by the Georgia Court of Appeals, uncorrected by the Georgia Supreme Court, is based upon a

premise which, though formerly true, is now false in the light of *Furman* and *Gregg, supra.*

The syllogism of the Court of Appeals of Georgia is as follows:

Major Premise

All charges of murder are charges of capital offenses unless the State waives the death penalty.

Minor Premise

The State did not waive the death penalty.

Therefore:

Conclusion

The State could successfully exercise challenges for cause as in a capital case.

This conclusion is false because it flows from a major premise that has been untrue since the case of *Furman, supra*, which declared unconstitutional the Georgia law of that time on the basis that it left juries with untrammeled discretion to impose or withhold the death penalty. In an earnest effort to comply with the standards and concerns of *Furman*, the Georgia Legislature enacted in 1973, *Georgia Code Section* 27-2534.1, which provides, among other things, in Section "C," that "unless at least one of the statutory aggravating circumstances enumerated in Section 27-2534.(b) is so found, the death penalty shall not be imposed." The very heart of this Court's ruling in the case of *Gregg, supra*, is to the effect that murder is a capital offense *only* where the clear and unequivocal criteria of a specified category of aggravation under Georgia Code Section 27-2534.1 is complied with.

3. The Georgia statutory system under which petitioner was sentenced to death is constitutional.

> The new procedures on their face satisfy the concerns of *Furman*, since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. Petitioner's contention that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by *Furman* are without merit. *Gregg v. Georgia, Supra.*

Therefore, in the light of *Furman* and the new Georgia Statute as interpreted and upheld by *Gregg*, a mere charge of murder, as serious as it is, is not a charge of a capital offense where there is no possibility of the evidence fulfilling the criteria of one of the statutory categories of aggravating circumstances.

Therefore, such a non-capital charge no more justifies the trial court in excusing otherwise fully qualified jurors in such a case than would a charge of burglary, aggravated assault or a misdemeanor allow such jurors to be excused on the sole basis of conscientious scruples against capital punishment.

Therefore, the truth of the matter is that the trial court disqualified three fully qualified jurors for no lawful reason and the Court of Appeals of Georgia, howsoever honorable its motives, has compounded this error by affirming it as if *Furman* and *Gregg* had never been decided and as if the Georgia Legislature had never acted.

The addendum in Division three of the Georgia Court of Appeals Opinion to the effect that Petitioner does not have standing since he was not sentenced to death does

not correct or justify the error because the line of authority relied upon grows from roots severed by *Furman* and looks to fruits wilted by *Gregg*. Each of those cases cited by the Court of Appeals of Georgia is applicable only where the death penalty is a theoretical possibility based on the evidence. This error is of such harmful infection that it penetrates to the core of the entire proceeding and corrupts everything that followed. Three kindly disposed jurors, fully qualified under law, who might have voted to acquit and free a man of no prior record, were denied him on a purely arbitrary and capricious basis unworthy of our Constitutional System and in violation of Petitioner's rights under the 5th and 6th Amendments of the United States Constitution, as made applicable to the States through the 14th Amendment of the United States Constitution, to due process of law and to an impartial jury.

2) 6th Amendment Right to Counsel and 5th Amendment Privilege Against Self-Incrimination

This Honorable Court should grant the Writ of Certiorari for the special and important reason that in this case the lower courts have sanctioned an application of this Court's ruling in the case of *Miranda v. Arizona*, 384 U.S. 436, in a way not in accord with this Court's rulings in the case of *Brewer v. Williams*, 45 U.S. Law Week 4287; 20 Criminal Law 3095 (3/23/77), *Michigan v. Mosley*, 423 U.S. 96, *Sims v. Georgia*, 385 U.S. 538, and *Miranda*, *supra*, itself.

The ruling of the Court of Appeals of Georgia, uncorrected by the Supreme Court of Georgia, contradicts this Court's rulings in two basic ways.

Firstly, it fails to adhere to this Court's standard of requiring the State to carry the burden of proving an

intentional relinquishment or abandonment by Petitioner of his 6th Amendment right to assistance of counsel. The infringement of Petitioner's rights in this case exceeds the actions condemned in *Brewer v. Williams, supra.* In *Williams* the rights were clearly understood by the accused. Petitioner testified explicitly, unequivocally, without cross-examination and without impeachment, that he, in fact, did not understand that he had the right to have a lawyer present at the time of interrogation, in contrast to later (T-124-126). In *Williams* the accused knew that he did not have to talk to the officers. Petitioner testified clearly and without cross-examination or impeachment that he did not understand that he was privileged not to answer a question posed by a law enforcement officer. In *Williams*, the accused did not request an attorney during interrogation. The State's case against Petitioner is based upon an alleged oral Monday Statement after Petitioner had repeatedly requested an attorney from either Saturday evening after the arrest (T-101) or from early Sunday morning (T-107) and again on Monday morning (T-126, 127), before the critical alleged oral statement. In *Williams* this Court was perceptive of the psychologically coercive atmosphere. Petitioner was in a far more coercive atmosphere. Petitioner had talked with no lawyer and had been in the custody of the Sheriff from the time he left the death scene. Petitioner testified that when arrested he was upset and his head was hurting (T-121); that he had been involved in a struggle with his wife right before the homicide (T-121); that he had been sick between struggles with his wife that evening (T-121); that he had been in a weakened condition right before the homicide (T-122); that right after the struggle in which the shots were apparently fired, he found himself recovering consciousness and lying on the ground (T-122); that

upon such recovery he had trouble walking (T-122); that many people came onto the scene (T-123); that after being taken to the Sheriff's office and jail that he was sick and upset (T-123); that the interrogation began at that time (T-123). Before the alleged oral Monday statement a deputy sheriff took Petitioner for a polygraph "to help him" in response to Petitioner's renewed request to see an attorney (T-126-127).

In addition, in *Williams*, the dissenting opinion by the Chief Justice emphasizes the lack of risk of unreliability of the accused's statement. In the instant case the keystone of the State's case is the alleged oral Monday statement which the record shows to be of serious unreliability; which relates directly and materially to the issue of guilt or innocence; and which places in question the entire fact finding process. The testimony by the Sheriff regarding this alleged oral statement is characterized by the following elements of unreliability:

(1) It was never reduced to a tape recording. (T-102, 105, 115).

(2) It was never reduced to writing. (T-104, 115).

(3) Sheriff Lee, throughout his testimony, had a confused memory regarding this case and particularly regarding the alleged statements by the Petitioner. (T-155).

(4) Sheriff Lee admitted that there was a two to four hour lag between the time that he allegedly had this oral interview with the Petitioner and had the opportunity to return to his office and record his recollections. (T-150).

(5) Sheriff Lee admitted that he had no contemporaneous notes of this alleged interview. (T-106, 151).

(6) Sheriff Lee admitted that during the two to four

hour interim between the time of the alleged oral interview and the recordation of his recollection, he was involved in court. (T-150).

(7) Sheriff Lee admitted that the alleged statement had been taken by him after Sheriff Lee had talked with the hostile inlaws of the Petitioner and the child, David Wayne Brown, who was incompetent to testify. (T-262).

(8) Sheriff Lee admitted that in the very heart of his report of this alleged statement that part of a sentence that he attributed to the Petitioner, regarding the throwing of a rock, was completely erroneous, and yet, according to his testimony, the next comment that he attributed to the Petitioner, and to which he testified in the same sentence, was the thread upon which the State's case rested, namely, that the Petitioner allegedly claimed to have fired two shots at the deceased while she was running away.

Secondly, the ruling of the Court of Appeals of Georgia failed to follow this Court's requirement that in custody statements of an accused are not admissible unless the accused has clearly, affirmatively and intelligently waived his applicable rights. The Court of Appeals of Georgia assumed that the Sheriff testified that the Petitioner fully understood his rights, whereas the record reflects that the testimony in which the Sheriff sought to give such an opinion was ruled out (T-101-102) and the Petitioner testified explicitly, unequivocally, without cross-examination and without impeachment that he, in fact, did not understand his Miranda rights (T-124-126). The Court erroneously assumed that testimony regarding alleged advice of rights before a fourth statement (T-168-173), which was in part exculpatory (T-189), related to the critical third statement upon which the entire case of the State was based, and further that be-

fore the critical third statement the Petitioner was properly advised of his rights, when, in fact, the Sheriff, after first testifying that he fully advised Petitioner of his rights (T-151), then admitted that on a preliminary hearing he had testified that he had not on that occasion advised Petitioner of his rights (T-152). The Sheriff was unable to say which of his contradictory statements was true (T-152). The Court concluded that there was sufficient evidence in the *Jackson v. Denno* hearing to support the finding that the statements had been made freely and voluntarily after Petitioner had been advised of all his constitutional rights. This was error because the State failed to present a prima facie case, and further, what evidence the State did present was unequivocally and explicitly refuted by the uncontradicted and unimpeached testimony of the Petitioner. The facts before the Court did not carry the burden required by this Court.

These violations of Petitioner's 5th and 6th Amendment rights destroy the integrity of the State's case and if this Honorable Court does not correct them Petitioner has no authority to whom to turn for protection of his Constitutional rights.

3) Denial of One Week Continuance

This Honorable Court should grant the Writ of Certiorari for the special and important reason that in this case the courts below violated this Court's standard of "fundamental fairness" under the 5th Amendment due process clause and the 6th Amendment requirement of effective assistance of counsel by denial of Petitioner's motion for a one-week continuance.

The record shows that when Petitioner's motion was filed on the Friday arraignment that a three week term

of criminal trials was scheduled to begin on the following Monday. Petitioner's counsel had just been retained as set forth in the Statement of the Case. The record shows that the only State's witnesses who testified were law enforcement officers and crime laboratory personnel. There is no showing of how the granting of Petitioner's motion would have prejudiced the State. The sole basis of the lower court's rulings against Petitioner's motion is that another lawyer had been nominally counsel of record for three months. The record fails to reflect any service rendered by that attorney prior to trial, on trial or on appeal.

If the 5th and 6th Amendments are to apply to substance rather than form then Petitioner was denied his liberty without due process of law and was denied the quality of effective assistance of counsel which his Constitution promises him.

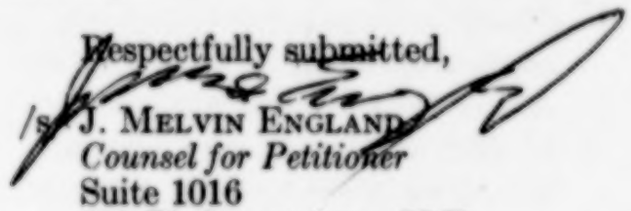
4) Recharge

This Honorable Court should grant the Writ of Certiorari for the special and important reason that in this case the lower courts have approved a violation of this Court's doctrine of "fundamental fairness" under the 5th Amendment due process clause, by allowing the trial court to suggest to the jury on recharge that the sole defense theory of accident is no longer relevant to their deliberations. This suggestion was made by glaring silence in view of the fact that such theory had been charged properly in the original charge but when the jury requested further clarification of its verdict options the trial court charged every option but the defense theory.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the Court of Appeals of Georgia.

Respectfully submitted,



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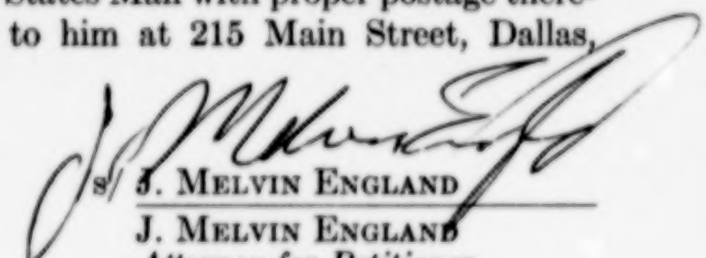
CERTIFICATE OF SERVICE

I, J. Melvin England, attorney for the Petitioner herein, and a member of the Bar of The Supreme Court of The United States, hereby certify that, on the 25th day of April, 1977, I served three (3) copies of the foregoing Petition to The Supreme Court of The United States, for the Writ of Certiorari to the Court of Appeals of the State of Georgia upon counsel for the Respondent, the State of Georgia, The Honorable John T. Perren, District Attorney, Tallapoosa Judicial Circuit, by depositing the same in the United States Mail with proper postage thereon and addressed to him at 215 Main Street, Dallas, Georgia 30132.



/s/ J. MELVIN ENGLAND
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APPENDICES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. _____

ROBERT FRANKLIN BROWN,

Petitioner,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

The Clerk will enter my appearance as counsel for the Petitioner.

/s/ J. MELVIN ENGLAND

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250 Piedmont Ave., N.E.
Atlanta, Georgia 30308
404/659-1990

The Clerk is requested to notify counsel of action of the Court by means of regular mail.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. _____

ROBERT FRANKLIN BROWN,

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PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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MARSHALL, Judge.

Appellant was indicted for the offense of murder with malice and convicted by jury of voluntary manslaughter. He was sentenced to serve 15 years. He brings this appeal from that conviction and sentence, enumerating 23 errors. *Held:*

1. Enumerations 1-3 are based upon the general grounds. After a thorough review and analysis of the evidence presented, we are satisfied that the evidence presented was sufficient to justify a jury in finding the appellant guilty of the offense of voluntary manslaughter. These enumerations are without merit.

2. In enumeration 4, appellant alleges that he was denied effective assistance of counsel and due process of law when the trial court denied a motion for continuance. Appellant retained his present counsel on a Wednesday, arraignment was on the following Friday and the trial commenced on the next Monday, September 22, 1975. However appellant was also represented at trial by other counsel who had been actively involved in appellant's defense since June, 1975.

All applications for continuance are addressed to the sound discretion of the court and shall be granted or refused as the ends of justice may require. There is no fixed rule as to the number of days that should, of right, be allowed counsel in a criminal case to prepare the case for trial, but the trial judge, in the exercise of his discretion to grant or refuse a continuance, has to consider the facts and circumstances of each case to determine what the ends of justice require. A statement by counsel for the

defendant that he has not had sufficient time to investigate and prepare the defense is a mere conclusion. Questions of this nature must of necessity be entrusted to the discretion of the trial judge. *Smith v. State*, 198 Ga. 849, 852 (33 SE2d 338); *Foster v. State*, 213 Ga. 601 (110 SE2d 426). An examination of this record discloses that the trial court did not abuse its discretion in refusing the requested continuance.

3. Enumerations 5-7 assert error in the excusing of three jurors on the sole ground that they were conscientiously opposed to capital punishment in a case in which capital punishment, under the facts, would not have been an authorized punishment. Regardless of the assertion by appellant that there were no aggravating facts adduced by the state that would have authorized the imposition of the death penalty, the fact remains that at the time of the voir dire examination, appellant was charged with a capital offense. The state never stated that it was not seeking the death penalty. Under these circumstances we conclude that it was not improper for the state's attorney to inquire into the predisposition of the prospective jurors in regards to this aspect of the case. Moreover, since appellant was not sentenced to death, he has no standing to object to the striking of jurors opposed to the death penalty. *Walker v. State*, 225 Ga. 734 (1) (171 SE2d 290); *Fountain v. State*, 228 Ga. 306 (2) (185 SE2d 62); *Pless v. State*, 231 Ga. 228, 229 (2) (200 SE2d 897).

4. Enumerations 8 and 16 assert the trial court erred in allowing the introduction of evidence that tended to place appellant's character in issue where appellant had not introduced that issue. Each of these occurrences involve questions of the marital status and relationship

existing between appellant and his deceased wife.

Our examination of the evidence of which complaint is made convinces us that the evidence was relevant and admissible. The witness whose testimony is in issue simply stated that he believed the status of husband and wife existed between the appellant and his wife but the witness was not personally aware of a wedding ceremony. The second reference concerned visits the witness had made because of "fusses" between the Browns. Such testimony is innocuous at worst and did not tend to place the appellant's character into issue. Even if the references had had such a tendency, prejudice to appellant would not have resulted. Where evidence is admissible as showing motive or to connect the accused with the crime charged, the mere fact that it may tend incidentally to put the character of the accused in issue does not render it inadmissible. *Anderson v. State*, 206 Ga. 527 (1) (57 SE2d 563); *Whippler v. State*, 218 Ga. 198, 200 (126 SE2d 744). These enumerations are without merit.

5. Enumerations numbered 9 and 10 contend that the court erred in allowing a state's witness to testify as an expert and give opinion testimony without proper qualification. The witness was the sheriff of the county and testified that he had investigated many homicides. He had attended training schools and had certain qualifications in wound identification. The evidence in question concerned testimony as to entrance and exit wounds, the probable position of the victim when she was shot and whether she could have been holding the death weapon. In each instance, the witness gave the basis of his opinion.

An expert is one who by habits of life and business has a peculiar skill in forming an opinion on the subject in dispute. *Sims v. State*, 40 Ga. App. 10, 13 (148 SE 769).

Whether or not a witness is allowed to testify as an expert is a question for the sound discretion of the trial court and such discretion, unless abused, will not be disturbed. *Rouse v. Fussell*, 106 Ga. App. 259 (4) (126 SE2d 830). Generally nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession; and special knowledge in regard to a particular subject may be derived from experience as well as study and direct mental application. *Carter v. Marble Products, Inc.*, 179 Ga. 122 (1) (175 SE 480); *Frazier v. State*, 138 Ga. App. 640, 645. We find no error in the admission of the opinion testimony by the sheriff.

6. Enumerations 11-15 deal with confessions. The principal contentions are that interrogation continued after appellant requested the assistance of counsel; that appellant did not understand his Miranda rights; and that one statement was taken without the benefit of a Miranda warning.

The evidence giving rise to this issue may at best be described as confusing. Reconciling the testimony of the interrogating officer as fully as possible, it reasonably appears that the sheriff received a call from appellant indicating that Mrs. Brown had shot herself and apparently was dead. Upon arriving at the scene of the shooting the sheriff observed the deceased prostrate on the ground, apparently dead, with a revolver clutched in her right hand. He was handed by another officer at the scene what appeared to be an authentic suicide note. Without the benefit of a Miranda warning, the sheriff asked the appellant what had happened since appellant was an eyewitness to the incident. Appellant related what apparently was a suicide. At this time appellant was detained but

not arrested. Appellant was taken to the police station pending the outcome of an autopsy, but still not in a status of arrest. Because of the nature of the wounds and the results of the autopsy, appellant came under suspicion. At that time he was fully warned of his Miranda rights. Appellant contends that at this first station house interview he was dazed and sick and did not fully comprehend his rights. The sheriff testified to the contrary. Appellant gave a statement reduced to a tape recording which reaffirmed his contention that Mrs. Brown had committed suicide or that the death resulted from an accident as appellant was attempting to disarm his wife and prevent her from taking her own life. Though it is not clear, it appears that later that same day the sheriff suggested that appellant take a polygraph examination. This was arranged for the next morning. At some point the sheriff also requested that appellant furnish handwriting specimens for the purpose of comparing those with the alleged suicide note. It appears that at the time appellant was requested to furnish handwriting specimens he asked to see an attorney. Efforts were made to obtain an attorney but these efforts were ineffectual. Thereafter, appellant agreed to give the specimens anyway. It is not clear whether the request for handwriting specimens and the polygraph suggestion occurred at this conference or at different times. Nor is it clear whether at this point and time appellant also gave the first inculpatory statement or whether the incriminating statement was given to the sheriff on the following day and after the administering of the polygraph test. In any event the sheriff testified that prior to this third statement appellant was advised of his Miranda rights and the appellant elected to give a statement without the presence of an attorney. There is evidence of what might have been circumstances

surrounding the third statement or of yet another incriminating statement at which the sheriff plainly advised appellant that since he had requested an attorney, the sheriff could not talk to him without the presence of the attorney. It is not controverted that at this time appellant requested that even if no questions could be asked, would not the sheriff simply listen to appellant's story. Lastly, the sheriff stated that the appellant had repeatedly requested interviews with the sheriff and that many conversations had occurred between the two.

Based upon the foregoing recitation of facts, we are satisfied that appellant's rights against self incrimination were not violated. As to the first statement given at the scene of the homicide, we conclude that this was the product of an on-the-scene investigation and not a custodial interrogation of a suspect upon whom the finger of suspicion was pointed. In the Miranda case it was held by the Supreme Court that the holding in that case was not intended to restrict police officers from seeking out evidence in the field. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process was not affected. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. *Miranda v. Arizona*, 384 U.S. 436, 477-478 (86 SC 1602, 16 LEd2d 694).

As to the remaining statements, the evidence was in dispute as to the appellant's understanding of his Miranda rights, and as to when he exercised his constitutional right to have an attorney present and whether he knowingly and intelligently waived such right. Nevertheless, the trial court had before it evidence developed in a Jackson-Denno type hearing (*Jackson v. Denno*, 378 U.S. 368, 84 SC 1774, 12 LEd2d 908, 1 ALR 3d 1206), that was sufficient to support the finding that the statements had been made freely and voluntarily after appellant had repeatedly been advised of all his constitutional rights as provided in Miranda, supra. *Wilson v. State*, 229 Ga. 395 (191 SE2d 783); *Street v. State*, 237 Ga. App. 307, 313.

The trial court did not err in overruling the motion to suppress or in admitting the several statements of the appellant nor in denying a motion for mistrial predicated upon the alleged reference to the last statement prior to a Jackson-Denno hearing but which subsequently was admitted properly into evidence by the trial court.

7. Enumeration 17 complains that the trial court erred when it refused to withdraw the verdict option of murder from the jury. In substance this is tantamount to a motion for a directed verdict of acquittal as to the offense of murder. In this case there was substantial evidence pointing toward the offense of murder. Only where there is no conflict in the evidence and a verdict of acquittal is demanded as a matter of law is it error for a trial court to refuse to direct a verdict of acquittal. *Merino v. State*, 230 Ga. 604 (198 SE2d 311); *Davis v. State*, 234 Ga. 730-732 (218 SE2d 20); *Allen v. State*, 137 Ga. App. 302, 303. Moreover, appellant has shown no harm in view of the fact that he was acquitted of murder. *Hollis v. State*, 137 Ga. App. 298.

8. Enumerations 18-23 question the charges of the court dealing with reasonable doubt, accident, involuntary manslaughter, and the felony murder rule. We have carefully examined the charge of the court. In each in-

stance, either the charge of the court fully covered the principle contended for by appellant in the appropriate language of the statute involved or the evidence did not reasonably raise an issue such as to require such an instruction. See *Leutner v. State*, 235 Ga. 77, 81 (218 SE2d 820); *Crawford v. State*, 236 Ga. 491, 493 (224 SE2d 365); *Pulliam v. State*, 236 Ga. 460, 466 (224 SE2d 8); *Nuckles v. State*, 137 Ga. App. 200, 204 (223 SE2d 245); *Stonaker v. State*, 236 Ga. 1 (222 SE2d 354).

Judgment affirmed. McMurray and Smith, J. J., concur.

Court of Appeals
of the State of Georgia

ATLANTA, October 25, 1976

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

52627. R. F. Brown v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA Oct. 25, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, CLERK.

SUPREME COURT OF GEORGIA

ATLANTA, January 7, 1977

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Robert Franklin Brown v. The State

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

BILL OF COSTS, $30.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that

England & Weller

paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

CASE NO. 52627

COURT OF APPEALS OF GEORGIA

REMITTITUR FROM SUPREME COURT

Filed in office

Clerk Court of Appeals of Georgia.

SUPREME COURT OF GEORGIA

ATLANTA, January 27, 1977

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Robert Franklin Brown v. The State

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Court of Appeals
of the State of Georgia

ATLANTA, October 8, 1976

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

52627. R. F. Brown v. The State

This case came before this court on appeal from the Superior Court of Douglas County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Marshall, J., McMurray and Smith, JJ., concur.

BILL OF COSTS, $30.00

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta, APR. 22, 1977

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, CLERK.

Supreme Court, U. S.
FILED
JUL 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

NO. 76-1486

ROBERT FRANKLIN BROWN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1486

ROBERT FRANKLIN BROWN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE
STATE OF GEORGIA

QUESTIONS PRESENTED

1.

Whether, in a prosecution for murder where the State has not waived the death penalty, the Fifth and Sixth Amendments to the United States Constitution were offended by the exclusion of three prospective jurors who were opposed to the death penalty.

2.

Whether a confession, which Petitioner, after being advised of his Miranda rights, made to a sheriff whom he knew well and frequently conferred with, is inadmissible because it was made at the county courthouse on the first Monday following the Saturday night on which Petitioner was carried to the sheriff's office at the county jail.

3.

Whether the refusal to grant Petitioner a continuance of one week in which to prepare for trial deprived him of due process where he was tried approximately one month after he was indicted and had assistance of counsel which he retained at least three months prior to the trial and present counsel which he retained five days before trial.

4.

Whether Petitioner was deprived of due process when the trial judge recharged the jury with respect to murder, voluntary manslaughter and involuntary manslaughter in accordance with the request of the jury.

STATEMENT OF CASE

This case arises out of the death of Shirley Brown, the paramour of Petitioner.

At approximately 9:00 P.M., Saturday, March 29, 1975, Mr. Earl Lee who is sheriff of Douglas County, Georgia, was called by Petitioner and told that Shirley Brown ("victim") had shot herself. (T. 83-84). Approximately twenty minutes later the sheriff arrived on the scene. (T. 84).

When the sheriff arrived, he consulted with Sergeant Latham who had arrived at the scene of the shooting earlier. (T. 85). He then observed that the victim's body appeared to have received three wounds. (T. 86). He also observed that the victim's hand contained a pistol; her finger was on the trigger. (T. 94). He performed a preliminary examination of the pistol.

After completing an investigation of the scene of the shooting, the sheriff took Petitioner down to the county jail with him. (T. 98). However, Petitioner was not charged with a crime. (T. 98).

Sheriff Lee left Petitioner at the "book-in" and went to observe an autopsy performed on the victim's body. The sheriff returned early Sunday morning and advised Petitioner of his Miranda rights. (T. 101). This interview was recorded and the recording shows that the Petitioner was plainly advised of his right to have counsel present during questioning. (T. 139). No physical force, threats, promise of reward, or other inducement was used to encourage Petitioner to answer the sheriff's questions. (T. 102). Petitioner did not tell the sheriff who shot the victim at that time.

The next day, Sheriff Lee took Petitioner to the Douglas County Superior Court. (T. 103). There, Petitioner indicated that he wanted to talk with the sheriff and Sheriff Lee advised him of his Miranda rights. Petitioner then told the sheriff how he had shot the victim in a fit of anger. (T. 104). Approximately two to four hours later, the sheriff recorded Petitioner's statement. (T. 150). The statement was not recorded at the time that it was given because the sheriff was away from his office and unprepared due to the spontaneous nature of the statement. (T. 149).

The statement which Petitioner made to the sheriff was substantially as follows: On the night of March 29, 1975, Petitioner and the victim were arguing about how the victim should be dressed in public. The victim apparently did not appreciate Petitioner advising her how to dress and told him that she would become the biggest whore in the county. Petitioner became angry and shot the victim once, at which time she turned, then he shot her again. After saying that she would not bother him again, the victim died. (T. 161-162).

At trial a hearing in accordance with Jackson v. Denno, 378 U.S. 368 (1963) was held. The sheriff presented the foregoing version of his investigation of the case. Petitioner did not deny that the sheriff had advised him of his Miranda rights, but asserted that he did not understand that he could have a lawyer present during questioning. (T. 124-126). Petitioner also claimed that when he was taken to the county jail his stomach was upset and his head was hurting as the result of a five to fifteen minutes struggle with the victim and what had happened. (T. 121, 123). Petitioner admitted that when he requested permission to call a lawyer, his request was granted. (T. 125).

The trial court allowed the Monday confession to be admitted into evidence. (T. 128-129). In the presence of the jury the sheriff repeated his testimony. He also testified that Petitioner did not suggest in any way that he was ill or needed medication until several days after he was taken to jail and after he had confessed to killing the victim. Even then, he only asked for some prescribed medicine. (T. 136).

The trial court also found a Tuesday statement relating to the shooting of the victim admissible after a Jackson v. Denno hearing. (T. 172-179). In that statement Petitioner admitted shooting the victim, but denied intending to kill her. (T. 184-185).

Mr. Kelly Fite of the State Crime Laboratory testified that one of the bullets which caused the victim's death was fired at a distance of eighteen inches or more from the victim's body. (T. 235).

After hearing closing arguments and hearing evidence, Petitioner was convicted of voluntary manslaughter. (T. 322).

Petitioner appealed his conviction to the Georgia Court of Appeals and that court affirmed. Brown v. State, 140 Ga. App. 160 (1976). Petitioner then applied to the Georgia Supreme Court for a writ of certiorari, but that court denied the petition. Petitioner now applies to this Court for review on a writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

A. THE EXCLUSION OF THREE JURORS IN A MURDER CASE WHEN THE STATE HAS NOT WAIVED THE DEATH PENALTY IS NOT AN ISSUE OF SUCH AN EXTRAORDINARY NATURE THAT THIS COURT SHOULD GRANT A PETITION FOR THE WRIT OF CERTIORARI.

It is contended by Petitioner that Furman v. Georgia, 408 U.S. 238 (1973), and Gregg v. Georgia, __U.S.__, 49 L.Ed. 2d 859 (1976), require that his conviction be reversed. This contention seems to be based on the argument that the killing of the victim in this case was not such that it could possibly be considered (even in theory) a proper case for the imposition of the death pnealty and thus, the exclusion of three persons from the jury on the basis of their opposition to the death penalty deprived him of an impartial jury. This argument lacks substance and cannot be supported.

In Gregg v. Georgia, supra, this Court, reviewing the Georgia death penalty statute, noted expressly that whenever a defendant is tried for murder in Georgia, there is a possibility that the death penalty will be imposed. Id, at 890. In ruling that murder

is a capital felony in Georgia, the Georgia Court of Appeals did no more than recognize that murder is an offense for which imposition of the death penalty is a possibility which is what the United States Supreme Court did in the Gregg decision. It follows that the affirmance of the trial court's action regarding the exclusion of three prospective jurors who were opposed to the death penalty was proper. Witherspoon v. Illinois, 391 U.S. 510 (1967). In addition whether any particular murder case is appropriate for the imposition of the death penalty cannot be determined until the person being tried has been convicted. Ga. Code Ann. §27-2534.1(b). Then, the jury which has convicted the defendant must impose the death penalty. Miller v. State, 237 Ga. 557 (1976). Moreover, since the trial judge had no discretion concerning the imposition of the death penalty in a jury case, his only authority was to rule on the issue actually presented by the State when it challenged the prospective jurors.

Furthermore, Furman was only concerned with the procedures under which the death penalty may be imposed. This Court held that Ga. Code Ann. §27-2534.1 rectified the procedural difficulties disapproved

in Furman v. Georgia, supra. Since the changes are procedural it would seem to follow that Georgia's designation of murder as a capital felony would be unaffected by Furman. See Dobbert v. Florida, __U.S.__45 U.S.L.W. 4721 (1977).

However, even if the present case conflicted with the Gregg and Furman cases in some way, Petitioner is still not entitled to relief. The Furman and Gregg cases are concerned with the constitutionality of the death penalty in Georgia, not the selection of jurors. Consequently, those cases are inapplicable to the present case. The present case seems to come within the rule of Bumper v. North Carolina, 391 U.S. 543 (1967). In that case, the Petitioner had been tried for a capital offense but received a life sentence. In this Court, the Petitioner argued that the exclusion of prospective jurors who were opposed to capital punishment deprived him of an impartial jury at trial. Citing Witherspoon v. Illinois, supra, this Court held that since the Petitioner was not sentenced to death and had failed to prove that the jury which tried him was prone to convict, relief would be denied on that ground. Although Petitioner in the present case does not expressly argue

that he was deprived of the right to an impartial jury, he does state that the three excluded jurors may have favored acquittal in his case. To the extent that such a statement may be considered a claim of denial of the right to an impartial jury, Petitioner is in no better position than the Petitioner in the Bumper case. He is thus not entitled to receive relief.

B. WHERE PETITIONER, AFTER BEING ADVISED OF HIS MIRANDA RIGHTS, MADE A CONFESSION TO A SHERIFF WHOM HE KNEW WELL AT THE COUNTY COURTHOUSE IN THE ABSENCE OF A COERCIVE ATMOSPHERE, HIS CONFESSION WAS ADMISSIBLE INTO EVIDENCE.

It is also contended by Petitioner that his conviction should be reversed because it rests upon an illegal confession. In support of this contention, Petitioner has made numerous allegations including that he was interrogated in a coercive atmosphere, that he was denied access to counsel, that he was physically distraught and that he did not understand his Miranda rights when they were given.

The trial record shows that before any statement which Petitioner made was introduced into evidence, the trial court held a hearing in accordance with the requirements of Jackson v. Denno, 378 U.S. 368 (1963). With respect to each in-custody statement made by Petitioner, the trial court found that the voluntariness of the statement was supported by a preponderance of the evidence. Leggo v. Twomey, 404 U.S. 477 (1972). Since Petitioner has limited his attack to the confession which he made on Monday at the county courthouse and Tuesday at the sheriff's office, the discussion herein will be similarly limited.

Prior to making his Monday confession to Sheriff Lee of Douglas County, Georgia, Petitioner had been advised of his Miranda rights at least twice. (T. 101, 148). There is some conflict as to whether Petitioner first asked about a lawyer on Sunday, March 30, 1975, or the following day. However, at trial, Sheriff Lee stated specifically that Petitioner did not ask to see a lawyer until after he had given his Monday confession. (T. 155). Moreover, the Monday confession was not obtained as the result of interrogation, but it was volunteered by Petitioner. (T. 148, 150). The confession took place at the county courthouse while Petitioner was being carried to court to have an attorney appointed to represent him. Furthermore, there is evidence that Petitioner was accorded every opportunity to gain access to an attorney or other persons whom he knew and there was evidence that Petitioner had associated with the sheriff on prior occasions. (T. 190-191).

In view of these circumstances, it is apparent that Miranda v. Arizona, 384 U.S. 436 (1965), is not involved in anyway in the present case, and Petitioner was not coerced to relinguish its protection. Indeed, the particular confession which Petitioner now attacks was not obtained as the result of interrogation.

Rather, as the record shows, Petitioner initiated the interview and was the only speaker during the entire interview.

The Petitioner also argues that the present case is controlled by Brewer v. Williams, __U.S.__, 51 L.Ed. 2d 424 (1977). This argument cannot be supported by the record, In Brewer v. Williams, supra, this Court affirmed the judgment of the Court of Appeals granting Williams a new trial. In reaching its decision, this Court noted particularly that at the time that Williams made his confession he had a constitutional right to counsel as there was no doubt that judicial proceedings had been initiated against him. Id., at 436. Having determined that Williams had a right to assistance of counsel, this Court turned its attention to a consideration of whether Williams had waived the right. After a review of the record in the Brewer case. this Court concluded that there was insufficient evidence to show that Williams had waived his right to counsel. Sub judice, at the time of his confession, Petitioner had not been arraigned and there was no warrant for his arrest. The only connection which the judiciary had with Petitioner was that Petitioner made his Monday confession, while he was in a county courthouse.

In cases where a criminal suspect has not been made the subject of judicial proceedings, this Court has enunciated a policy restricting the suspect's right to have access to his counsel to cases similar to Escobedo v. Illinois, 378 U.S. 478 (1964), where the policemen interrogating the suspect had refused his repeated request to see his lawyer who was then present at the police station. See Michigan v. Tucker, 417 U.S. 438 (1974).

Sub judice, there is no testimony suggesting that Petitioner was refused access to his lawyer. Indeed, quite the reverse seems to be the case. While Sheriff Lee was not certain as to the particular time when Petitioner requested to see an attorney, he was positive that Petitioner was advised of all of his rights and given every opportunity to contact an attorney or any other persons. Since there were no judicial proceedings initiated against Petitioner when he confessed and since he was given every opportunity to contact an attorney and since Petitioner was not physically or psychologically coerced to confess, there can be no doubt that Petitioner has been accorded every constitutional right to which he was entitled.

It is further suggested by Petitioner that Michigan v. Mosley, 423 U.S. 96 (1976) supports his claim of the denial of his Fifth and Sixth Amendment rights. A review of that case shows differently. Michigan v. Mosley, supra, related to the question of whether a resumption of interrogation approximately two hours after a criminal suspect communicated that he did not desire to talk with police authorities violated the suspect's constitutional rights. This Court held that the suspect's right in that case was not violated where a reasonable time had elapsed since the suspect communicated his desire not to speak and Michigan police re-advised Petitioner of his Miranda rights before interrogating him on a second occasion. In the present case, Sheriff Lee advised Petitioner of his Miranda rights prior to each interview even though the record indicates that Sheriff Lee did not interrogate Petitioner in connection with the Monday and Tuesday confessions. In addition, the Monday confession occurred one day after Petitioner was first interviewed. Thus, to the extent that it can be said that Michigan v. Mosley, supra, is applicable, it supports the position of Respondent.

Sims v. Georgia, 385 U.S. 538 (1966), which Petitioner also relies upon, has no bearing upon the present case. The Sims case involved the failure of the trial court to accord the petitioner a hearing in accordance with this Court's ruling in Jackson v. Denno, supra. In the present case, a hearing in accordance with Jackson v. Denno, supra, was held. It would appear therefore that the Sims case has no applicability to this case.

C. WHERE THE PETITIONER WAS REPRESENTED BY COUNSEL AT LEAST THREE MONTHS PRIOR TO TRIAL AND RETAINED ADDITIONAL COUNSEL FIVE DAYS PRIOR TO TRIAL, HE WAS NOT DEPRIVED OF A FAIR TRIAL.

Petitioner urges the Court to grant a writ of certiorari in this case on the basis that the refusal of the trial court to grant him a continuance of one week deprived him of a fair opportunity to defend. The issue which Petitioner raises has been discussed by the courts extensively. United States v. Mason, 440 F.2d 1293 (10th Cir. 1971); Sykes v. Commonwealth of Virginia, 364 F.2d 314 (4th Cir. 1966); Eubanks v. United States, 336 F.2d 269 (9th Cir. 1964); Puglie v. United States, 343 F.2d 837 (1st Cir. 1965); United States v. Ray, 351 F.2d 554 (8th Cir. 1963). It is settled that whether a request for additional time is to be granted is a matter for the trial court's discretion. United States v. Mason, supra. In exercising its discretion, the trial court is authorized to evaluate the facts and circumstances of each case. In view of the decisions dealing with the point which Petitioner has raised in connection with his motion for a continuance, it is apparent that Petitioner has failed to raise an issue worthy of consideration by this court.

Particularly, Petitioner's contention that he was deprived of fundamental fairness due to inadequate time to prepare for trial is meritless in the context of the present case. The case for the State consisted primarily of a confession by Petitioner. Petitioner's defense was to have the trial court exclude the confession. Any unacceptable behavior by the Douglas County Sheriff's Department could have easily been disclosed by Petitioner at trial. Secondly, Petitioner was represented by an attorney for approximately three months prior to trial, this attorney continued his representation of Petitioner at trial. The hiring of present counsel was done at the behest of Petitioner. Except for some seeming criticism of the first attorney retained to represent him, Petitioner raises no substantive reasons for a continuance. Petitioner contents himself with the argument that the record fails to reflect any service rendered by that attorney. The lack of a court record is not a true indication that Petitioner's former attorney failed to render services to Petitioner. Thirdly, Petitioner's trial involved primarily fact issues. There was no question as to the presence of Petitioner at the time the victim was shot. The only question was whether the victim had been shot as the result of an accident.

The person who knew the facts was Petitioner and he was available to present counsel several days prior to trial. Finally, Petitioner's trial counsel had five days in which to prepare for trial. In view of the fact that the present case involved issues of fact which were within the knowledge of Petitioner, five days were clearly more than adequate time in which to prepare for trial.

D. PETITIONER'S CLAIM THAT THE TRIAL JUDGE IMPROPERLY REINSTRUCTED THE JURY IS SO INSUBSTANTIAL THAT THIS COURT SHOULD DENY THE PETITION FOR THE WRIT OF CERTIORARI.

Petitioner's final contention is that this Court should grant his petition for writ of certiorari because the trial court deprived him of due process by failing to reinstruct the jury on accident when it reinstructed the jury on the offenses of murder, voluntary manslaughter and involuntary manslaughter. Unquestionably this contention presents an insubstantial issue to the court.

It is now clearly settled that the feasibility and scope of any reinstruction of the jury is a matter residing within the discretion of the trial judge. Whiting v. United States, 321 F.2d 72, 75 (1st Cir. 1963), cert. den. 75 U.S. 884, 11 L.Ed. 2d 114 (1963); United States v. Salter, 346 F.2d 509, 512 (6th Cir. 1965); Allen v. United States, 186 F.2d 439, 444 (9th Cir. 1951); United States v. Wharton, 433 F.2d 451 (D.C. Cir. 1970). Indeed, one court has said that it is elementary that a supplemental charge is to be read in connection with, and in context with, the original charge. Albizu v. United States, 88

F.2d 138 (1st Cir. 1937), cert. den. 301 U.S. 707, 81 L.Ed. 1361 (1937).

In the present case the jury requested that the trial court reinstruct it as to the offenses of murder, voluntary manslaughter and involuntary manslaughter. The trial court complied with this request exactly. That the trial court did not reinstruct the jury with respect to the defense of accident was not an abuse of its discretion. Since the court instructed the jury on the defense of accident in its original instruction and since the supplemental charge is to be read in connection with the original charge, it is obvious that a reinstruction is not subject to any attack to which the original charge is not also subject. In addition, the trial court's reinstruction as to the offenses of murder, voluntary manslaughter and involuntary manslaughter did not prejudice the jury's consideration of Petitioner's defense of accident as the elements of those offenses are independent of the accident defense.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari to review the judgment of the Court of Appeals of Georgia be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Brief for the Respondent in Opposition upon Mr. J. Melvin England, Counsel for Petitioner, Suite 1016, 250 Piedmont Ave., Atlanta, Georgia 30308, by depositing same in the United States mail, properly addressed with sufficient postage prepaid.

This ___ day of _____,1977.

JOHN C. WALDEN